



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

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Matter of: Ship Analytics, Inc.; District 2,
Marine Engineers Beneficial Association
File: B-227084; B-227084.2
Date: May 5, 1987

DIGEST

1. Under the Competition in Contracting Act of 1984, General Accounting Office, as before, will not review a challenge to the award of a cooperative agreement unless there is some showing that a procurement contract should have been used.
2. Provisions of Office of Management and Budget circulars generally establish executive branch policies, agency compliance with which is not considered under the General Accounting Office's bid protest function.
3. Protest that agency improperly sought offers leading to the award of a cooperative agreement instead of a procurement contract is untimely when solicitation clearly reflects agency intent to award cooperative agreement and protest is not filed until after closing date for receipt of offers.

DECISION

Ship Analytics, Inc. and District 2, Marine Engineers Beneficial Association, protest the award made under solicitation MA-11973 issued by the Maritime Administration. The award, for the "privatization" of a government-owned computer simulator at the United States Merchant Marine Academy, resulted in a cooperative agreement rather than a procurement contract. Under the agreement, the successful offeror is to operate and maintain the facility and upgrade the equipment; it can also market the facility to third parties and retain the proceeds from such activity.

138812/132889 We will not consider this matter.

Under the Competition in Contracting Act of 1984 (CICA), we consider protests involving the award of contracts for the procurement of goods and services and solicitations leading to such awards. 31 U.S.C. §§ 3551-6 (Supp. III 1985). The award of a cooperative agreement is not the award of a procurement contract. See 31 U.S.C. §§ 6303, 6305 (1982); Burgos & Assocs. Inc., 58 Comp. Gen. 785 (1979), 79-2 CPD ¶ 194. Consequently, with the enactment of CICA, we have

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continued our practice of generally not considering challenges to the award of a cooperative agreement. See, e.g., National Firehawk Foundation, B-220388, Oct. 31, 1985, 85-2 CPD ¶ 500; Del Mfg. Co., B-200048, May 20, 1981, 81-1 CPD ¶ 390. We do consider such challenges, however, where there is some showing that a cooperative agreement was used where a contract was required. See Southeastern Michigan Business Development Center, B-222344, Mar. 28, 1986, 86-1 CPD ¶ 299; MAXIMUS, B-195806, Apr. 15, 1981, 81-1 CPD ¶ 285.

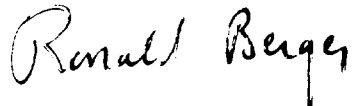
Here, the protesters, members of a consortium that responded to the solicitation, complain primarily about the evaluation of proposals; they also assert that "the privatization should have been conducted as a procurement and not as a cooperative agreement." According to the protesters, this should have been a procurement because the Office of Management and Budget (OMB) Circulars (Nos. 102 and 110) "relied upon by the agency set out the ground of privatization to charitable and non-profit organizations only whereas this is a transaction for profit with commercial organizations."

As we have often stated, OMB circulars generally set forth matters of executive branch policy, compliance with which is not a matter for consideration under our bid protest function. United States District Court for the District of Columbia, 58 Comp. Gen. 451 (1979), 79-1 CPD ¶ 301; Planning Research Corp. Public Management Services, Inc., 55 Comp. Gen. 911 (1976), 76-1 CPD ¶ 202; American Council of Independent Laboratories, Inc., B-223820, Aug. 7, 1986, 86-2 CPD ¶ 169; Comten, Inc.--Request for Reconsideration, B-186983, Mar. 9, 1977, 77-1 CPD ¶ 173. Moreover, the circulars to which the protester refers deal with grants to state and local governments and to non-profit organizations, and say nothing with respect to what the agency has done here. Thus, the protester's statement, by itself, does not constitute the necessary showing that a procurement contract was required to be used in this instance. Also, since a cooperative agreement, rather than a procurement contract, is to be used where a "thing of value" is to be transferred to a recipient instead of the government's acquiring property or services for the direct benefit or use of the government, 31 U.S.C. § 6305, the agency here appears to have had a reasonable basis for using a cooperative agreement. That being so, we must conclude that the protesters have not satisfied the "threshold requirement" to show that a procurement should have been conducted. See Electronic Space Systems Corp., 61 Comp. Gen. 428 (1982), 82-1 CPD ¶ 505.

In addition, we point out that the protest on the issue of the propriety of using a cooperative agreement is untimely.

Our regulations require a protest of a solicitation defect to be filed prior to the time set for receipt of initial offers. See 4 C.F.R. § 21.2(a)(1) (1986). The solicitation clearly indicated that a cooperative agreement would be awarded, and the protesters therefore should have objected to this approach prior to the closing date for receipt of offers. Instead, they participated in the competition and only upon losing did they file their protest. Such a protest clearly is untimely.

For the reasons set forth above, the protest is dismissed.

A handwritten signature in cursive script that reads "Ronald Berger".

Ronald Berger
Deputy Associate
General Counsel